APPENDIX A

(1) Petition for Writ of Habeas Corpus, Shott v. Tehan, No. 5376, Filed in the United States District Court for the Southern District of Ohio on June 24, 1963, p. 7:

j. In further violation of petitioner's constitutional right of due process of law and his constitutional right against self-incrimination, the prosecutor in his closing argument to the jury attacked petitioner for not taking the stand in his defense. . . .

Petitioner was further denied due process of law inasmuch as the prosecuting attorney in his closing argument attempted to introduce "evidence" of an alleged series of loan transactions made by petitioner which purportedly transformed the single private Sestito loan into a part of a "public offering" of petitioner's "securities:" . . .

(2) Memorandum in Support of Petition for Writ of Habeas Corpus, Shott v. Tehan, No. 5376, Filed in the United States District Court for the Southern District of Ohio on June 25, 1963, p. 29:

II. The Prosecution's Closing Argument Deprived Petitioner of Due Process of Law.

Fn.[20] It should be noted that the Supreme Court has indicated a willingness to re-examine the rule of *Adamson* by granting certiorari on June 1, 1963, in *Malloy* v. *Hogan,* No. 1031, which squarely raises the question whether the Fifth Amendment right against self-incrimination is enforceable against the states through the Fourteenth Amendment. If the Court reverses *Adamson,* then, of course, the prosecutor's remarks, on their face, denied Petitioner due process of law. The consistent course of Supreme Court decisions making specific protections of the Bill of Rights enforceable against the states indicates that the *Adamson* rule is in jeopardy. See *Ker* v. *California,* 83 S.Ct. 1623 (1963) (reported at 31 Law Week 4611) (Fourth Amendment) and cf. *Mapp* v. *Ohio,* 367 U.S. 643 (1961) with *Wolf* v. *Colorado,* 338 U.S. 25 (1949)

(Fourth Amendment); *Robinson* v. *California,* 370 U.S. 660 (1962) (Eighth Amendment); *Gideon* v. *Wainwright,* 83 S.Ct. 792 (1963) with *Betts* v. *Brady,* 316 U.S. 455 (1942) (Sixth Amendment). We reserve our right on this point.

(3) Brief for Appellant, Shott v. Tehan, No. 15,538, Filed in the United States Court of Appeals for the Sixth Circuit on Sept. 16, 1963, pp. 37-40:

3. *Whether Appellant's state criminal conviction violated due process of law as guaranteed by the Fourteenth Amendment to the Constitution because the Prosecutor, in closing argument, charged that Appellant's failure to take the stand in his defense was, in effect, an admission of his guilt. Although the District Court answered the question "no," Appellant submits that the answer should have been "yes."*

In closing argument the State prosecutor commented repeatedly on Appellant's failure to take the stand to testify in his defense. Such comment apparently is authorized by the Ohio Constitution.

We submit that under federal constitutional standards it is a deprivation of due process of law for the State to permit a prosecutor to comment on the defendant's failure to take the stand. Clearly, under federal standards, it is a violation of the self-incrimination clause of the Fifth Amendment for a federal prosecutor to comment on a defendant's failure to take the stand. And under the present standards of due process, we submit that the due process clause of the Fourteenth Amendment incorporates the self-incrimination provisions of the Fifth Amendment. Therefore, on this independent ground, Appellant's conviction was obtained in violation of due process.

In 1947 a deeply-divided Supreme Court held in a five-to-four decision that under the standards then prevailing, a state statute or constitution which permits a prosecutor to comment on the defendant's failure to take the stand

does not violate due process. *Adamson* v. *California*, 332 U.S. 46 (1947). However, since that time the consistent course of Supreme Court decisions has been to make the specific protections of the Bill of Rights enforceable against the states. See, *Ker* v. *California*, 83 S.Ct. 1623 (1963) (Fourth Amendment); and *cf.*, *Mapp* v. *Ohio*, 367 U.S. 643 (1961) *with Wolf* v. *Colorado*, 338 U.S. 25 (1949) (Fourth Amendment); *Robinson* v. *California*, 370 U.S. 660 (1962) (Eighth Amendment); *cf.*, *Gideon* v. *Wainwright*, 83 S.Ct. 792 (1963) *with Betts* v. *Brady*, 316 U.S. 455 (1942) (Sixth Amendment). These cases clearly indicate that the rationale of the *Adamson* decision is no longer controlling.

It is of signal importance that the Supreme Court has indicated its intent to re-examine the rule of *Adamson* by granting certiorari, in *Malloy* v. *Hogan*, October Term, 1963, No. 110, a case which squarely raises the question whether the Fifth Amendment right against self-incrimination is enforceable against the states through the Fourteenth Amendment. A reversal of *Adamson*, of course, would make the prosecutor's remarks, on their face, a denial of due process of law.

We submit that the course is clear and ask that this Court hold that the prosecutor's comments constitute a denial of due process and a deprivation of Appellant's rights against self-incrimination, as guaranteed by the Fourteenth Amendment.

However, in the alternative, we submit that the prosecutor's conduct violated due process even under the *Adamson* standards. The comment in this case goes so far that when coupled with the instructions of the trial court, it amounts to a directed verdict. We do not think that the doctrine of the *Adamson* case should go beyond permitting comment upon the defendant's failure to explain evidence against him. Here there is no evidence against the defendant that there was a "multiplicity of transactions"

except the statements of the prosecutor in his address to the jury.

The Supreme Court has held that the State's failure to afford a defendant a fair hearing "violates even the minimal standards of due process." *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). The prosecutor, as the representative of a sovereign whose obligation is to govern impartially, has a duty to insure that a fair hearing is actually provided. *Berger* v. *United States*, 295 U.S. 78 (1935). When state prosecutors have been guilty of gross misconduct in trying a criminal defendant, the Supreme Court has not hesitated to grant relief to protect the rights of due process. See *Alcorta* v. *Texas*, 355 U.S. 28 (1957); *Townsend* v. *Burke*, 334 U.S. 736, 740 (1948); *Mooney* v. *Holohan*, 294 U.S. 103, 112-13 (1935). *Cf., Adamson* v. *California*, 332 U.S. 46, 58 (1947); *Buchalter* v. *New York*, 319 U.S. 427, 431 (1943); *Lisbena* v. *California*, 314 U.S. 219, 237 (1941).

Similarly, this Court has recognized the fundamental responsibility of the sovereign to provide a fair trial and has on numerous occasions reversed lower court decisions because of misconduct of the prosecutor. See, *United States* v. *Dunn*, 299 F. 2d 548, 556 (6th Cir. 1962); *Oliver* v. *United States*, 202 F. 2d 521, 523 (6th Cir. 1953); *Ross* v. *United States*, 180 F. 2d 160, 167 (6th Cir. 1950); *Pierce* v. *United States*, 86 F. 2d 949 (6th Cir. 1936). In the *Ross* case, the prosecutor's "prejudicial and inflammatory" closing argument was the basis of the reversal. 180 F. 2d at 167. The prosecutor there, as here, attacked defendant for alleged activities which went far beyond anything in the record and which were highly prejudicial to defendant.

This record demonstrates the unusual situation where the prosecutor in his closing argument, has stepped beyond the basic standards of fair procedure and necessarily precluded a fair and reasoned consideration of the evidence by the jury. This denied Appellant due process of law.

First, in his closing statement, the prosecutor repeatedly attempted to introduce evidence of an extended series of similar loan transactions. This was clearly improper because the evidence in this record is limited to a single private loan transaction which the creditor-witness himself stated was the only loan transaction in which he and the Appellant were involved. *Ross* v. *United States, supra.* Clearly, due process demands that an accused be convicted only by evidence in the record, *Thompson* v. *Louisville,* 362 U.S. 199 (1960), and not by the prosecutor's constant charge that Appellant had entered into a series of promissory transactions.

Further, the prosecutor's repeated, startling attacks against Appellant for not taking the stand is a deprivation of due process in these circumstances where the State had proved nothing but innocent conduct. The prosecutor's statements were clearly unfair and infringed upon Appellant's rights against self-incrimination. The prosecutor demanded a conviction based not upon evidence of record, but solely upon an inference of guilt because Appellant had refused to take the stand in his defense. *Cf., Adamson* v. *California,* 332 U.S. 46, 58 (1947). Thus, the prosecutor's conduct fell below the standards of due process. As the Supreme Court said in *Viereck* v. *United States,* 318 U.S. 236, 248 (1943):

> "He [the Prosecutor] may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."